United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2347

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FOR THE SECOND CIRCUIT

Docket No. 74-2347

ARTHUR S. KURLAN, et al.,

Appellants,

-against-

HOWARD H. CALLAWAY, SECRETARY OF THE ARMY, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, and JOHN C. BAKER, COMMANDING GENERAL, NEW YORK ARMY NATIONAL GUARD,

Appellees.

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On Appeal from the United States District Court
for the Southern District of New York

Reply Brief of Appellants

Of Counsel:
Steven J. Hyman

KUNSTLER KUNSTLER & HYMAN
ATTORNEYS AT LAW
370 LEXINGTON AVENUE
NEW YORK, N.Y. 10017

Attorneys for Appellants

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Reply Brief of Appellants

This brief is submitted in reply to the claim by appellees WILSON and BAKER in Point II of their brief, that the District Court lacked jurisdiction in this action.

Because this issue has been raised in this particular action for the first time on appeal, appellants did not deal with this issue in their brief. However, in

order to respond to this claim, a reply brief is necessary. It should be noted that in considering this case, the District Court determined that adequate jurisdiction existed to go to the merits of the case. See Kurlan v. Callaway, , [A. 13-24] and Mela v. Callaway, [A. 6-12]. In considering this case it should also be noted that appellees had filed a notice of appeal and had docketed the record in Mela v. Callaway, but failed to pursue the appeal in timely fashion, ultimately resulting in its dismissal.

The District Court has Jurisdiction in this Action

This Court has full jurisdiction over the subject matter and parties to the action. Appellants seek to have appellees adhere to their own rules and regulations and otherwise to act consistent with controlling statutes and the Constitution. See Smith v. Resor, 406 F. 2d 141 (2d Cir. 1969) and Hornstein v. Laird, 327 F. Supp. 993 (S.D. N.Y. 1971).

It is submitted that under 10 U.S.C. §269, appellants are entitled as a matter of right to transfer to the Standby Reserve Mela v. Callaway, supra. */ There is full

*/ Appellees WILSON and BAKER seem to indicate that appellants seek discharge from the Service. That, however, is not the relief appellants have requested. All they seek is their rights under the statute.

jurisdiction in this Court to determine and assess the legality of the actions taken by appellees under this section.

Appellants' claim, as set forth in their brief, is that as a result of the actions by Governor Rockefeller and Governor Wilson under the Executive Orders, appellants have fulfilled the necessary requirements to obtain transfer to the Standby Reserve. They further assert that the effort by Governor Wilson to deny appellants the right to transfer while granting other Guardsmen such rights under the same circumstances, defeats the Congressional intent and otherwise is an abuse of discretion that warrants review by this Court. The effort by appellees to distinguish between appellants and other Guardsmen to exclude appellants from the consent given, is reviewable by this Court to determine the legality and correctness of it.

This is not a case where the court is being asked to intervene in the operation of the Armed Forces in areas best left to military discretion or to substitute its judgment for that of the military. See Orloff v. Willoughby, 345 U.S. 83 (1953) and Fox v. Brown, 402 F. 2d 837 (2d Cir. 1968). Rather, appellants seek enforcement of their rights as granted them by Congress. They further seek to require appellees to adhere to their regulations and orders and to have those regulations and orders implemented according to law. Whether appellants fit within the terms

of 10 U.S.C. §269(e) and whether the terms of §269(g) have been fulfilled are legitimate areas of inquiry properly before this Court.

Had the Governor of the State of New York never granted his consent to persons in appellants' position and had he not continued to grant his consent to transfer to the Standby Reserve to Guardsmen who served on active duty during the mail strike, appellees' argument might have merit. However, the Governor chose to exercise his authority under §269(g), and once he did and continues to do so, this Court may require that such exercise of authority be applied consistent with the statute, based upon determinations properly within the Governor's authority and not otherwise implemented in an arbitrary and capricious manner. Smith v. Resor, supra. The Governor's discretion was whether or not to grant his consent in the first place. Once he did so, this Court has full jurisdiction to determine whether appellants have been wrongfully denied the benefits of it in conjunction with §269(e)(2). See Hornstein v. Laird, supra; Mela v. Callaway, supra. Cf. Hammond v. Lenfest, 398 F.2d 704 (2d Cir.1968).

It is unclear from the brief of appellees WILSON and BAKER whether they also are claiming a lack of jurisdiction based upon a claim that this Court has no authority over the state defendants. If so, it is submitted that such a claim is totally without merit.

Jurisdiction over the Secretary of the Army is clear and, in fact, has never been contested by the United States government. Under 28 U.S.C. §1361 appellants seek mandamus relief and under 28 U.S. C. §1391(e) venue is properly within the Southern District of New York. If appellants are correct that they qualify for transfer to the Standby Reserve, then mandamus is the appropriate form of relief and vests full jurisdiction of this Court over appellee CALLAWAY. The District Court so held. See, also, Mela v. Callaway, supra; Hornstein v. Laird, supra.

So long as the Secretary of the Army refuses to implement appellants' transfer to the Standby Reserve, they cannot obtain such benefits. Thus he is an essential party to the action and any order granting appellants the relief requested must of necessity name the Secretary as a party defendant.

Appellants have also joined as parties to the action appellees WILSON and BAKER, since their refusal to accomplish appellants' transfer to the Standby Reserve subject to the final approval of appellee CALLAWAY is clearly an important fact in this litigation. Under Rule 20, Federal Rules of Civil Procedure, appellees WILSON and BAKER are properly joined as party defendants to this action since their acts involve common questions of law and fact with that of the appellee CALLAWAY and they arose out of the same transaction or occurrence.

The District Court found jurisdiction over appellees WILSON and BAKER under 28 U.S.C. §1343 and 42 U.S.C. §1983. Appellants concur in such a finding. The issues involved in this case concern the personal rights of appellants and otherwise involve substantial questions of appellants' rights under Congressional statute (10 U.S.C. §269and 277) as well as the Fifth and Fourteenth Amendments to the Constitution Eisen v. Eastman, 421 F. 2d 560 (2d Cir. 1969) and Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971). A review of the complaint filed in this action, it is submitted, sets forth sufficient allegations to justify jurisdiction on this basis alone [A. 25-46].

However, jurisdiction over WILSON and BAKER is also based upon the judicial theory of pendent jurisdiction United Mine Workers v. Gibbs, 388 U.S. 715 (1966). This doctrine has,of course, been recognized and followed in this circuit. Almenares v. Wyman, supra; Astor-Honor v. Grossett & Dunlap, 441 F.2d 627 (2d Cir.1971); Leather's Best, Inc. v. S.S. Mormalclynx, 451 F.2d 800 (2d Cir. 1971).

The issues raised by this action are clearly federal in nature and involve the interpretation and implementation of Congressional statutes and Army Regulations. The crux of appellants' case involves adjudication of their rights to transfer to the Standby Reserve as provided by Congress in 10 U.S.C. §269.

The primary defendant in this action of necessity is appellee CALLAWAY. He alone has the ultimate authority to effectuate appellants' transfer to the Standby Reserve. As noted previously, mandamus jurisdiction is clearly applicable under 28 U.S.C. §1361 as to appellee CALLAWAY and the United States government does not contest it.

Jurisdiction over appellees WILSON and BAKER flows directly from the jurisdiction obtained over appellee CALLAWAY. The issues as to all of them involve a "common nucleus of operative fact" (United Mine Workers v. Gibbs, supra). The same issues, the same facts and the same law are applicable to all appellees, and a determination as to one is a determination as to all of them. Under the doctrine of Gibbs as adopted in this circuit in Astor-Honor v. Grossett & Dunlap, supra; Leather's Best Inc. v. S.S. Mormaclynx, supra, and Almenares v. Wyman, supra, it is clear that this Court has jurisdiction over all appellees.

If the arguments of WILSON and BAKER were to prevail it would require appellants to sue in state court and then sue in federal court to achieve their remedy. Since the United States government is not amenable to process of the state courts (See 1 Moore ¶0.6(5)) and the interpretation of federal statutes by state courts is not binding upon the United States government, it is clear that such an action would be an exercise in futility.

The doctrine of pendent jurisdiction forms sufficient basis for jurisdiction over appellees WILSON and BAKER. It allows the action to be tried in one court and to have the issue determined by the tribunal competent to render a decision over all parties. It prevents multiplicious litigation. There can be no doubt that the issues involved in this case and the relationship of all the appellees is such that appellants' claims against all of them are derived from "a common nucleus of operative fact". See United Mine Workers v. Gibbs, supra. Further, the doctrine of pendent jurisdiction applies to both subject matter as well as parties and therefore permits full jurisdiction to be achieved over appellees WILSON and BAKER. See Almenares v. Wyman, supra, at p. 1083.

The other basis for jurisdiction which should be noted is that this case arises under a federal question and therefore comes within the terms of 28 U.S.C. 1331.

Clearly, this case presents a federal issue. The only remaining question then would be whether appellants have met the $10,000 requirement. It is submitted they have.

The requirement of $10,000 is met by the uniqueness of the damages that appellants will suffer if not transferred to the Standby Reserve. As pointed out in Hornstein v. Laird, appellants will be damaged irreparably by being required to attend two weeks' summer camp away from their jobs and homes; required to attend at

least 48 more drills of the Active Ready Reserve; be required to be available for alerts and subject to call to active duty by the President of the United States for a period of up to two years less active duty time served; and be required to be subject to call-up as involuntary reservists for unsatisfactory performance under 10 U.S.C. §673(a). (See Fox v. Brown, 402 F.2d 837 (2d Cir.1968).).

It has been held that being a member of the military imposes certain limitations and, in fact, constitutes a suspension of constitutional rights. See Raderman v.Kaine, 411 F.2d 1102, 1104 (2d Cir. 1969). It has also been held that military status is a unique one in assessing damages, in Berk v. Laird, 429 F.2d 302 (2d Cir. 1970).

In view of these factors it is submitted that the refusal to transfer plaintiffs to the Standby Reserve and relieve them of all the above obligations will cause them damage sufficient to come within the jurisdictional amount prescribed by Congress.

In light of the above discussion it is submitted that this Court has full jurisdiction to adjudicate the issues as to all the parties and to render a decision thereon.

Respectfully submitted,

KUNSTLER KUNSTLER HYMAN &
GOLDBERG
Attorneys for Appellants

By: _____
Steven J. Hyman
A Member of the Firm